

¹ This is the date claimant was laid off her job with respondent.

further stipulated that claimant's average weekly wage increased as of May 21, 2010² and she would therefore be entitled to the maximum weekly compensation of \$401 per week.

ISSUES

Although the ALJ concluded that claimant had met her burden of establishing a change of circumstances and resultant permanent partial general (work) disability under K.S.A. 44-510e(a), she denied claimant's request to modify her Award after concluding that more than 415 weeks had passed since the date of claimant's accident.

The claimant requests review of this decision, arguing that K.S.A. 44-510e(a) governs the *initial* calculation of an award while K.S.A. 44-528 applies to requests to review and modify those initial awards. And K.S.A. 44-528 does not contain any limitation of time other than to limit the retroactivity of the revised finding of functional impairment or work disability to 6 months. Claimant goes on to argue that she is entitled to a modification of her Award to reflect her 100 percent wage loss and the stipulated 30 percent task loss.

Respondent contends the ALJ's denial of claimant's request for a modification of the earlier Award should be affirmed. Succinctly put, respondent maintains that K.S.A. 44-510e(a) should be read concurrently with the provisions contained in K.S.A. 44-528, the review and modification statute. Thus, once 415 weeks from the date of accident have passed, an injured claimant is no longer entitled to disability benefits as held in *Ponder Coppage*.³

The only issue presented in this appeal is whether an award can be modified to increase claimant's permanent partial general (work) disability when 415 weeks have passed following an April 3, 2001 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Review and Modification Award should be affirmed.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

² This is the date claimant's fringe benefits were terminated and as a result, her average weekly wage calculation increased.

³ *Ponder-Coppage v. State of Kansas*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

Highly summarized, claimant was awarded a 12.5 percent permanent partial impairment of function to the whole body as a result of her work-related injuries to her bilateral upper extremities that occurred on April 3, 2001.⁴ Since that Award, claimant continued to work at a comparable wage up until May 21, 2009 when respondent was no longer able to accommodate her restrictions. Claimant has not yet returned to work and thus has a 100 percent wage loss. The parties have agreed that claimant sustained a 30 percent task loss as a result of her injury. But as the ALJ noted, those findings alone do not necessarily compel the modification of claimant's Award.

For an April 3, 2001 accident, the Workers Compensation Act provides that only 415 weeks of benefits are payable for temporary and permanent partial general disability benefits. K.S.A. 44-510e(a) provides, in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, **the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.** (Emphasis added.)

The review and modification statute, K.S.A. 44-528, does not address the length of the period that an injured worker is entitled to receive workers compensation benefits. That statute provides in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon

⁴ R.M.H. Trans. at 7.

such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.⁵

The statute does, however, provide that any increase or diminution of an award is “subject to the limitations provided in the workers compensation act.”⁶

The ALJ determined that “[o]ver 415 weeks have passed from the date of accident April 3, 2001 through the claimant’s last date of work, May 21, 2009. A total of 423 weeks have passed since the date of accident.”⁷ Accordingly, the ALJ determined claimant could not modify her original July 31, 2002 Award.

Claimant argues that the principles of strict construction compel the Board to reverse the ALJ’s decision. Claimant contends -

When an initial award is granted, the presumption in 44-510e controls the starting point for weekly payments due under the Award. If [c]laimant collects the maximum of \$100,000 for a permanent partial disability, payments are made at the full rate for a period not to exceed 415 weeks. If, however, one is paid less [than] the maximum, and the disability later increases, payout under KSA 44-510e is, again, subject to KSA 44-528. The increase in disability up to the statutory maximum is paid beginning at the point the disability occurs.

. . .

If the Kansas Legislature, in the 1993 Act, had intended to impose a Statute of Limitations or deadline upon filing for review and modification, such a deadline could have been added to KSA 44-528. It was not. KSA 44-528 controls Review and Modification proceedings.

By contrast, KSA 44-510e only controls the method of payment on the initial Award, including the total weeks payable for an injury as well as the amount of the weekly payments. EXCEPT subject to and controlled by KSA 44-528 when disability later increases and Modification of the Award is appropriate.

The Kansas Supreme Court in *Bergstrom v. Spears Manufacturing*, Case No. 99,369, has instructed us to strictly construe these statutes and specifically to depart from adding to the plain language of the Statute. The plain language of the

⁵ K.S.A. 44-528.

⁶ *Id.*

⁷ ALJ Order (Mar. 31, 2010) at 5.

Review and Modification Statute, KSA 44-528, has no limitation on the filling [sic] of the Application for Review and Modification.⁸

The Board has considered claimant's argument, but nevertheless agrees with the ALJ's analysis. The Board concludes Judge Barnes correctly interpreted K.S.A. 44-510e and, consequently, the Board agrees claimant was limited to the 415 weeks of temporary and permanent partial disability benefits that claimant has received.

Although claimant seems to argue that in a review and modification proceeding K.S.A. 44-528 provides its own cause of action that is unlimited in monetary value and not limited in weeks, the statutes belie that argument. K.S.A. 44-528 specifically conditions a modification of an existing award "*subject to the limitations provided in the workers compensation act.*" One of those limitations is plainly found in K.S.A. 44-510e(a). An injured employee's compensation for disability shall not exceed a maximum of 415 weeks.⁹ That same statute provides:

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, *subject to review and modification as provided in K.S.A. 44-528.*¹⁰

The Board finds this language controlling. In addition, the Court of Appeal's finding in *Ponder-Coppage*¹¹ further supports this finding. Although claimant invites the Board to overrule the holding in *Ponder-Coppage* based upon the strict construction approach recently embraced by our Supreme Court in *Casco*¹² and *Bergstrom*¹³, the Board is unwilling to do so. There is binding precedent for the ALJ's decision and the Board is duty bound to follow based upon the principle of *stare decisis*.

⁸ Claimant's Brief at 7-9 (filed May 4, 2010).

⁹ K.S.A. 44-510e(a).

¹⁰ K.S.A. 44-510e(a)(3).

¹¹ *Ponder-Coppage v. State of Kansas*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

¹² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

¹³ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 31, 2010, is affirmed in every respect.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge